No. 16719

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & COMPANY, a corporation, *Appellant,* *vs.* SIDNEY SCHULEIN, Trustee in Bankruptcy of the Estate of Charles Robert Baldwin and Betty June Baldwin, bankrupts, *Appellee.*	No. 16719

Brief of Appellant

On Appeal from the United States District Court for the Eastern District of Washington Northern Division

JOHN HUNEKE
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C. W. HILL PRINTING CO.

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A. SUBJECT INDEX

AUTHORITIES CITED

CASES

STATUTES

MISCELLANEOUS

B. STATEMENT OF JURISDICTION

This case arises out of a controversy in bankruptcy.

1. (a) The jurisdiction of the District Court is based on the following statutes:

52 Stat. 854; 11 USCA 46 — Jurisdiction of Bankruptcy Controversies.

62 Stat. 931: 28 USCA 1334 — District Court's Jurisdiction in Bankruptcy.

66 Stat. 420; 11 USCA 11 — Courts of Bankruptcy jurisdiction and powers.

(b) The jurisdiction of the Court of Appeals is based on the following statutes:

62 Stat. 929; 28 USCA 1291 — Jurisdiction of Appeals.

66 Stat. 423; 11 USCA 47 — Jurisdiction of Appellate Courts in Bankruptcy.

2. While the validity of the following section of the Bankruptcy Act is not questioned, its application in this case is the principal reason for the controversy which has arisen.

Sec. 70 (e) (2). 66 Stat. 429; 11 USCA 110 (e) (2).

"All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall

be avoided by, the trustee for the benefit of the estate: *Provided, however,* That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable Federal or State laws.

3. (a) The pleadings to sustain the jurisdiction in the District Court are found in the following references:

(1) Petition in Bankruptcy (Tr. 3)

(2) Order Affirming Order Declaring Conditional Sales Contract of Sears Roebuck and Co. Absolute Sale (Tr. 27)

Supplemental Order to Show Cause Why Conditional Sales Contracts Should not be Declared Absolute Sales and the Lien Thereof Preserved for the Benefit of the Bankrupt Estate. (Tr. 42)

(3) Certificate by Referee to Judge (Tr. 28)

Certificate by Referee to Judge (Tr. 38)

(b) The pleadings to sustain jurisdiction of the court of Appeals are found in the following references:

(1) Memorandum Decision and Order (Tr. 52-67)

(2) Notice of Appeal, Undertaking for Costs on Appeal and Appellant's Statement of Points. (Tr. 67, 68, 69).

Parenthetically, appellant respectfully points out that while the above cited Act covering jurisdiction of Appellate Courts in bankruptcy (66 Stat. 423, 11 USC 47) provides in part as follows:

> "and provided further that when any order, decree, or judgment involves less than $500.00, an appeal therefrom may be taken only upon allowance of the Appellate Court",

that this appeal does not refer to a money amount alone, but involves a principle and interpretation of the Bankruptcy Act which far transcends this particular case, and in many instances could exceed the $500.00 limitation. The Hon. Sam M. Driver, now deceased, in passing on this case and four somewhat similar cases, stated:

> "I have decided not to write a memorandum opinion for publication in Federal Supplement, as I think that in the public interest these cases — or at least one, or more, that are typical — should be appealed so that we may have an authoritative decision by the Court of Appeals for the Ninth Circuit. Since five of them have come up in the relatively small Eastern District of Washington within a short period of time, it seems logical to assume that a great number must arise in the Western District of this State, and in other large districts where the state statutory requirements are similar to those of Washington. In the event of appeal, any opinion that I might write, even if affirmance resulted, would be of very little authoritative value." (Tr. 57-58).

The parties to this appeal are conscientiously seeking a definitive answer for the guidance of trustees, adverse parties and the District Courts, in future dealings with this problem. Appellant respectfully suggests that the Court of Appeals

has jurisdiction. See *State of California v. Fred* S. *Renauld & Co.*, 179 F. 2d 605, wherein the Court stated at page 608,

> "In addition to the money herein involved it is apparent that the point for decision is of considerable importance to the state tax structure and of importance in relation to the federal bankruptcy act and its administration in the federal courts. We believe these circumstances justify our proceeding to consider the case on its merits."

C. QUESTION INVOLVED AND STATEMENT OF THE CASE.

The basic question in this case may be stated as follows:

Is a trustee in bankruptcy required to determine the true market value of personal property claimed as exempt by the bankrupt, and then to set aside such property to the bankrupt up to the valuation limits fixed by the state law; or does the fact that such property was purchased more than four months prior to bankruptcy under a conditional sale contract not filed for record in accordance with the state law, and on which a balance of the purchase price is still owing at the time of bankruptcy, permit the trustee to set aside to the bankrupt as exempt only a so-called "equity" in such personal property, and then proceed to collect the balance of the purchase price from the bankrupt?

The facts in this case are not in dispute and the controversy is one of interpretation based on the statutes and on the pleadings which point out the following sequence of events.

Charles Robert Baldwin and Betty June Baldwin, husband and wife, purchased from Sears Roebuck and Co., (hereinafter referred to as Sears, or as appellant) a sewing machine on December 18th, 1954, for $197.00, and a refrigerator on July 25th, 1955, for $211.95 under conditional sales contracts, which contracts were not recorded in accordance with the recording statutes of the State of Washington. (Tr. 18). RCW 63.12.010: Sale absolute unless contract filed; as follows:

> "All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all bona fide purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions, including the rate of interest and the purchase price exclusive of interest, insurance and all other charges, and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." (Balance not applicable.)

On February 21st, 1957, the Baldwins filed a voluntary petition in bankruptcy (Tr. 3-8) and were adjudicated bankrupt on February 25th, 1957 (Tr. 8), at which time there was still owing on the purchase price of the above two items of merchandise the sum of $231.72 (Tr. 14). The bankrupts claimed all of their household goods as exempt, estimating the value thereof at $320.00, but not limiting their claim to that amount. (Tr. 5, 7). Prior to any allowance of exemptions, the Trustee, by petition, obtained an order directed to Sears ordering it to show cause why any of its rights in

the above two items of household goods should not be transferred to the Trustee (Tr. 9-12). The attempt in seeking such order, and the result of the order appealed from, was to forfeit whatever rights Sears has in such property, and as such, Sears is an interested adverse party in the bankruptcy. Sears appeared in response to such order to protect its rights in the two items of merchandise mentioned above. Despite an order which was entered March 25th, 1957 (Tr. 13-14) the Referee re-opened the proceedings (Tr. 17) and allowed Sears to answer the Trustee's petition (Tr. 18-19). The Trustee on May 16th, 1957, filed a Report of Exempt Property to set apart the household furniture, with the following comment:

> ". . . Subject, however, to claim of lien of the Trustee arising out of . . . seller's interest in conditional sales contract of Sears-Roebuck RCW 6.16.010 et seq. 11 USCA Sec. 24 (Sec. 6 Bankruptcy Act) Equity to the extent of any excess over described liens." (Tr. 19-20)

Sears filed objections to the Report (Tr. 21-23). The Referee approved the Trustee's Report of Exemptions on May 27th, 1957, (Tr. 23, 24) and Sears petitioned for a review of both orders. The Referee certified the matter to the District Judge (Tr. 28-31). Thereafter the Hon. Sam M. Driver on February 28th, 1958, entered an order remanding the matter to the Referee for further action, which order is quoted in part as follows:

> "It is Now, Therefore, Ordered that this matter be remanded to the referee, who is hereby instructed to make or cause to be made a list of the items of property and the estimated values thereof claimed as exempt by the bankrupts, to set off such exemptions, or cause them

to be set off, if such has not heretofore properly been done, and specifically to find whether the property covered by the above referred to conditional sales contracts constitute a part thereof; that the referee give notice of his proposed findings and conclusions as aforesaid to the attorneys for the trustee, the bankrupt, and Sears, Roebuck and Company, giving them an opportunity to be heard and object thereto. After the determination of the exempt property, the referee shall reconsider the order hereinabove mentioned involved in this review proceeding, making such changes therein as he deems appropriate as a result of the findings made and conclusions reached pertaining to the exempt property, and that such order as the referee may then make, or cause to be made, shall be subject to review in the same manner as any other order entered by the referee." (Tr. 36-37).

The Trustee's amended Report on Exemptions (Tr. 40-42) listed the items of household goods set aside to the bankrupts, and referred to the two items being purchased from Sears as follows:

"Coldspot refrigerator—equity ..... 50.00* Value $200.00

Kenmore sewing machine —
equity ..... 35.00 Value $116.72

*These two items, at the time the petition was filed, were being purchased from Sears Roebuck & Co. under conditional sales contracts, the lien of which the trustee reserves the right to preserve for the benefit of the bankrupt estate."

This report having been approved (Tr. 37) and Supplemental Findings and Conclusions of Law having been entered, the Referee entered his Supplemental Order May 23rd, 1958, which is the basis for this appeal and which

Appellant submits is in error. It provides in part as follows:

> "It is Further Ordered, Adjudged and Decreed that all of the rights of said Sears Roebuck & Co. be and they are hereby preserved for the benefit of the bankrupt estate, and as a condition to retaining possession of said Kenmore sewing machine and Coldspot refrigerator the bankrupts shall pay to the trustee the unpaid balance owing thereon, to-wit, the sum of $231.72, in the same manner as is prescribed in the original contract of conditional sale." (Tr. 48).

From this order a petition for review was filed and after a hearing and argument the Hon. William J. Lindberg, District Judge, entered a Memorandum Decision and Order affirming the Referee's order explaining his decision in the following language.

> "It thus appears that the same basic questions now before me for review were before Judge Driver in the earlier review and an examination of his letter-opinion makes it clear that Judge Driver sustained and affirmed the referee on the issues here presented. Further, it is reasonable to assume from a reading of the latter portion of the letter-opinion that the motivating purpose of Judge Driver in remanding the case to the referee was to correct and remedy a defective record with respect to the trustee's report on exemptions so as to permit an appellate review of his decision on the basic question on the merits. Under the doctrine of 'law of the case' a judge of coordinate jurisdiction should not overrule decisions of his associate based on the same set of facts, unless required by higher authority or unless it can be authoritatively concluded that the earlier decision was clearly erroneous (Citing cases) I am not persuaded that Judge Driver's opinion is clearly erroneous and therefore it is incumbent upon me to affirm the order of the referee upon this review without going into the merits of the case." (Tr. 64-65).

This appeal followed.

The basic question set out above, further illuminated by these facts, now appears as follows:

Should the Trustee be required to set aside to the Baldwins the items of household goods, including the sewing machine and refrigerator, as exempt, as appellant contends; or may the Trustee set aside only the so-called "equity" of $85.00 in the sewing machine and refrigerator together with the other property, and then proceed to enforce collection of the balance of $231.72 due on the sewing machine and refrigerator from the Baldwins, as the Referee ordered?

The Washington exemption statutes allow as exempt, all wearing apparel, private libraries not to exceed $500.00 in value, household goods not exceeding $500.00 in value, and not to exceed $250.00 in lieu of animals (R.C.W. 6.16.020, Appendix i). Under these provisions the total property claimed by the bankrupt and listed in the Trustee's amended report of exemptions may be set aside within the allowable valuations. This includes the sewing machine and refrigerator.

The question may be even more simply stated. Under these circumstances may a Trustee in Bankruptcy set aside only an "equity" in personal property, wholly claimed as exempt, and then collect the balance of the purchase price of such goods from the bankrupt? The appellant's position is that the Trustee may not, and that the Referee and District Court are in error in so ordering.

D. SPECIFICATION OF ERRORS

The errors relied on are set out in appellant's Statement of Points as follows:

> "(1) The District Court erred in affirming the order of the referee in bankruptcy, declaring the unfiled conditional sales contracts covering the sale of a Coldspot refrigerator and a Kenmore sewing machine by Sears, Roebuck and Company to the bankrupts were absolute sales, when such items of personal property were claimed as exempt by the bankrupts.
>
> "(2) The District Court erred in affirming the order of the referee in bankruptcy that Sears, Roebuck and Company, Petitioners, had no further right, title, or interest, in the Coldspot refrigerator and Kenmore sewing machine purchased by the bankrupts under unfiled conditional sales contracts and claimed as exempt by the bankrupts.
>
> "(3) The District Court erred in affirming the order of the referee in bankruptcy that, as to the Coldspot refrigerator and Kenmore sewing machine purchased from Sears, Roebuck and Company under unfiled conditional sales contracts and claimed as exempt by the bankrupts, the interest of Sears, Roebuck and Company could be preserved by the Trustee for the benefit of the bankrupts' estate, and the two items could be retained by the bankrupts on condition that the balance of the sales contracts of Two Hundred and Thirty-One Dollars and Seventy-Two Cents ($231.72) be paid by the bankrupts into the bankrupts' estate." (Tr. 69-70)

As is apparent from the previous statements of the basic question involved, the errors referred to may be considered

together and the argument will be directed to the one issue in dispute.

E. SUMMARY OF ARGUMENT

Appellant's position is this. When household goods are claimed as exempt by bankrupts, and when such goods have a valuation within the state statutory exemptions, such goods must be set aside to the bankrupt, and the Trustee has no further right in such goods, nor any claim to any unpaid portion of the purchase price of such goods, and cannot collect or attempt to collect such unpaid purchase price from the bankrupt, despite the lack of filing of a conditional sale contract covering the original purchase of such goods.

Appellant's argument is divided into four subdivisions:

1. Title to exempt property at no time is in a bankruptcy Trustee.

2. Section 70 (e) (2) of the Bankruptcy Act does not purport to apply to exempt property.

3. The bankrupt's exemptions are not affected, in this case, by any interest Sears may have in the exempt property.

4. The Trustee cannot require the bankrupt to pay funds into the estate which are not subject to inclusion in the estate.

ARGUMENT

1. Title to exempt property at no time is in a bankruptcy Trustee.

It must be apparent, and yet it is the basic concept underlying Appellant's theory of this case, and should be kept in mind during the argument, that title to exempt property at no time is in the Trustee, but remains, at all times, in the bankrupt.

This has been true ever since *Lockwood v. Exchange Bank,* 190 US 294, 23 Sp. Ct. 751, 47 L.Ed. 1061, which involved bankruptcy and the claim of an unsecured creditor who held a waiver of exemptions by the bankrupt. The court held that as the entire property was within the exemptions allowed by state law, the bankruptcy court would not administer the exempt property and stated on page 300 of 190 U. S.

> ". . . Moreover, the want of power in the court of bankruptcy to administer exempt property is, besides, shown by the context of the act; since, throughout its text, exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration . . ."

Also see *Baumbaugh v. Los Angeles Morris Plan Co.,* 30 F. 2d 816, involving the validity of a chattel mortgage given within four months prior to adjudication in bankruptcy. The following quotation from page 816 is in point:

> ". . . It was conceded by counsel for appellant on the hearing that the property covered by the chattel mortgage is, by the laws of California, exempt from execution. The title, therefore, did not pass to the

> trustee but remained in the bankrupt, and was not subject to administration by the bankruptcy court . . ."

Also see *In re Durham,* 104 F. 231 at 233:

> ". . . where the property is claimed as exempt, no title passes to the trustee, and he is only entitled to the possession thereof for the purpose of ascertaining, by proper appraisement, whether the value of the property does not exceed that allowed as exempt under the laws of the state . . ."

The bankrupt first must claim his exemptions, and the Baldwins did that in this instance. (Tr. 5, 7).

On Trustees, then, devolves the duty set out in Section 47 (a) (6) of the Bankruptcy Act to "set apart the bankrupt's exemptions allowed by law, as claimed, and report the items and estimated value thereof to the court as soon as practicable after their appointment."

General Order No. 17: 11 USCA foll. sec. 53.

In re Lippow, 92 F. 2d 619

Often this duty is ignored or postponed by Trustees, as it was in this case until required after appeal to the District Court. The Trustee made no itemization and no determination of value of such items until after the original appeal to the District Court. (Tr. 35-37).

When the exemptions are approved by the court, the property is then set aside to the bankrupt and the Trustee cannot administer it in any way, has no title to it, and no

concern over any claims which may exist between the bankrupt and some third party as to the exempt property.

In re Lippow, 92 F. 619 at 621:

> ". . . Title and possession of the goods in question passed to appellant, and the mere fact that certain creditors claimed superior rights does not preclude debtor from claiming such property as exempt. Remington on Bankruptcy, volume 3 (3d Ed. 1923) page 149, lays down the rule as follows: 'Nevertheless, the law is settled differently, and seems to be, in brief, that the sole question to be determined by the bankruptcy court is whether or not the property is exempt against creditors in general. If it be so exempt, then it is to be set apart, and further administration of it refused, notwithstanding that as to some creditors, it might not be exempt' . . ."

3 *Remington on Bankruptcy*, sec. 1271 at p. 143:

> ". . . Once property has been definitely set aside to the bankrupt as exempt, it is no longer within the control of the bankruptcy court, and ownership of the property as between the bankrupt and a third person is not subject to determination by that court . . ."

3 *Remington on Bankruptcy*, sec. 1286 at p. 177:

> ". . . Exemption claims of the bankrupt with respect to property which is exempt generally as to creditors are to be recognized and given effect by the court notwithstanding the property may not be exempt as to some creditors . . ."

3 *Remington on Bankruptcy*, sec. 1316 at p. 242:

> ". . . That there are creditors who have such favored claims is not a ground for refusing to allot and

deliver to the bankrupt property claimed as generally exempt . . ."

The items of exempt property, up to the valuation allowed by State statutes, being set aside to the bankrupt, neither add to nor detract from the estate that is subject to distribution to creditors. With such exempt property neither the creditors nor the Trustee are concerned.

An underlying purpose of the Bankruptcy Act is to make available to the creditors all of the bankrupt's property *except the exemptions.* To that end the various sections of the Act, including those with "strong-arm clauses," provide for seeking out and retaining for the estate all property in which the bankrupt had an interest, or which he may have concealed or transferred in fraud of creditors, but *over and above his exemptions.*

Likewise, all of each item of personal property claimed as exempt is set aside. There is no provision in the Washington State statutes for setting aside any partial interest in personal property. RCW 6.16.020 (Appendix i). The various items referred to in the statute are either set aside or they are not. In this case the bankrupt claimed as exempt his wearing apparel, a book, and his household furniture, including the sewing machine and refrigerator, all of which were belatedly itemized by the Trustee and which had a total valuation within the State of Washington statutes referred to above.

All wearing apparel is exempt and the Trustee valued this at $10.00 (Tr. 41). All private libraries up to $500.00 are exempt and the Trustee valued an encyclopedia at $10.00

(Tr. 41). Household furniture up to $500.00 is exempt and additional property may be selected up to a value of $250.00 in lieu of animals. The other items of household furniture including the refrigerator valued at $200.00 and the sewing machine at $116.72 would add up to a value set by the Trustee of $519.22 (Tr. 41) which is within the allowable exemptions for all of the items and their value. As such, these items of property must be set aside to the bankrupt and not administered further in the bankruptcy.

In re Kilgo, 223 F. 2d 167 at 170:

> ". . . It is well settled that when it becomes apparent the homestead property does not exceed the exemption, it is the duty of the Trustee to disclaim it as property of the bankrupt; and one holding a waiver, as here, may enforce his claim in the state court without regard to bankruptcy.

Also see *Baumbaugh v. Los Angeles Morris Plan Co.*, 30 F. 2d 816 (supra).

Appellant submits that as title to exempt property is never in the Trustee, as the items were claimed as exempt by the bankrupt, and as the valuation of such items set by the Trustee was within the statutory allowance, that all of the items, including the refrigerator and sewing machine must be set aside to the Baldwins without further administration in the bankrupt's estate.

2. Section 70 (e) (2) does not purport to apply to exempt property.

The Trustee in this case, and under the guise of this Section 70 (e) (2), is attempting to reach, or administer, an

interest in a portion of the exempt property, on the ground that the failure by Sears to file the original conditional sale contract in some way takes away some of the bankrupt's rights in the exempt personal property; and because this interest of Sears exists in the property, that in some fashion it should be added to the bankrupt's estate. To authorize this the Trustee relies on Section 70 (e) (2) of the Bankruptcy Act quoted above and particularly the 1952 Amendment, which added the proviso:

> "*Provided, however,* that the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee."

The Trustee then attempts to "preserve for the benefit of the estate" the interest that Sears has in the exempt property. Appellant submits that this is a mis-application of this section.

Appellant submits that the proviso is taken out of the context of Section 70 (e) by the Trustee and that this section applies only to transfers which are fradulent or voidable by any creditor having a provable claim, and does not purport to apply to exempt property. In situations involving other than exempt property, unless the Trustee is given the "strong arm" clause in the proviso quoted above, he would not be able to accomplish any benefit for the estate, in the sort of fradulent or voidable transfer referred to, by merely setting aside such fraudulent or void transfer; for the reason that then a junior encumbrancer, who otherwise would have no claim, could take advantage of the avoidance for his own benefit. The proviso was included

to prevent this windfall to a junior interest. That is not the situation in this case, as there is no "junior encumbrancer" who might otherwise gain an advantage over general creditors on the avoidance of a fraudulent or voidable transfer. Certainly the bankrupt is not such a junior encumbrancer, and there is no other.

The legislative history of this proviso seems to be limited to remarks contained in House Report No. 2320, 82nd Congress, 2nd Session (1952) at page 16, as follows:

> "Where under the act a transfer by way of lien, security title or otherwise, or an obligation, is void or voidable against a trustee in bankruptcy, it may under certain circumstances be necessary to preserve the same for the benefit of the estate by subrogating the trustee to the rights of the transferee or obligee, so that the benefits intended for the estate would not be passed on to junior interests not entitled thereto.
>
> "Under section 60b, the lien or security title, voidable as a preference, may be preserved for the benefit of the estate and passed to the trustee, and, under section 67a(3), a lien obtained by judicial proceedings, which is voidable, may likewise be preserved for the benefit of the estate and, to evidence title thereto, a conveyance thereof to the trustee may be directed. A like situation may arise under section 70e with respect to a transfer or obligation which is void or voidable against the trustee, but the subdivision contains no provision of preservation for the benefit of the estate similar to that contained in section 60b or section 67a(3). The bill provides language which supplies the omission and which is adapted to the situation." U. S. Code Congressional & Administrative News, Vol. 2, page 1976.

It is obvious that the proviso is added solely to give the Trustee the same "strong arm" provisions under this section that he had been given under the other sections mentioned. There is no inference, nor have any cases been found, that indicate that this section, 70(e), was meant to apply to exempt property. Section 70, in its entirety, covers "title to property". Section (a) provides that title of the bankrupt vests in the Trustee *"except insofar as it is property which is held to be exempt"*, and this quoted phrase is repeated twice later in the same section; (b) covers executory contracts; (c) gives Trustees benefit to defenses; (d) covers transfers after bankruptcy; (e) covers fraudulent or voidable transfers; (f) covers appraisals; (g) covers transfers to purchasers; (h) (repealed); and (i) covers arrangements. The entire section has to do with the *title* of the Trustee to property of the bankrupt, and does not apply to exempt property where title is not in the Trustee.

The purpose of this section is to preserve an asset for the "benefit of the estate" which might otherwise be lost and appellant submits that exempt property is not at any time considered as being for the benefit of the estate and no interest in exempt property can pass to the Trustee for the benefit of the estate.

To make this section, 70(e), applicable there must be in existence an actual creditor with a provable claim who can object to a fraudulent or voidable transfer. Appellant submits that there can be no such creditor in this case. There is nothing in the Washington State statute making the failure to file a conditional sales contract either fraudulent

or voidable. The statute only states that title is absolute as to all bona fide purchasers, subsequent creditors, etc.

The title becomes absolute and when claimed as exempt by the purchaser, there is no creditor to object. Sears is not a creditor as contemplated by the Section 70(e). Nor is the Trustee in bankruptcy such a creditor, and Section 70(e) does not apply in this case.

In Re Di Pierro, 159 F. Supp. 497 at 499:

> "(1) Under Section 70, sub. e of the Bankruptcy Act, the trustee in bankruptcy has the power to avoid any transfer which could have been avoided by any creditor of the debtor under applicable state or federal law had not bankruptcy intervened. The trustee does not possess an independent power of avoidance, but may act only upon the rights of at least one creditor having a provable claim in bankruptcy against whom the transfer or obligation was invalid under such law."

In Re Consorto Const. Co., 212 F. 2d 676 at 679:

> "Under this subdivision the trustee is subrogated to the rights of existing creditors as to whom the obligations of the bankrupt are voidable."

There can be no creditor then who could object to the rights of the Appellant, nor be entitled to any rights in the property when the property is claimed as exempt. Under these circumstances there is no person to qualify under Section 70(e) so that it is clearly evident that when the property is claimed as exempt, this section no longer has any application.

Under the Washington statutes, the title under unfiled conditional sale contracts is made absolute in the purchaser

as to actual creditors named in the statute. R.C.W. 63.12.010 (supra). If the title is absolute in the Baldwins, the exemption must be absolute also. It is obvious that if no exemption had been claimed in the property, the entire property, the title being absolute, would pass to the Trustee and there would be nothing in addition for the Trustee to preserve for the benefit of the estate. Also, there would be no interest of Sears to be considered. The Trustee would have the entire property and could sell or dispose of it for the benefit of the estate. However, when such property is claimed as exempt, the entire property is also exempt and there is no interest the Trustee can acquire in it.

The Trustee is not a bona fide purchaser, nor in the shoes of one, and even if he were, the claim of exemption would be good against him. The Trustee has complex rights, but the Trustee does not obtain greater rights under 70(e) than a creditor with a provable claim; and under the state law, no such creditor can complain if an exemption is claimed in the property. The Trustee is not executing on a judgment for the purchase price, and the purchaser can assert his exemption against everyone else.

See *Myers v. Matley,* 318 U.S. 622; 63 Sp. Ct. 780; 87 L. Ed. 1043 at 1044:

"An Adjudication in bankruptcy is not the equivalent of a judicial sale, nor is the trustee given the rights of a purchaser at such a sale."

Anderson Buick Co. v. Cook, 7 Wn. 2d 632, 110 P. 2d 857, at 638:

"In *Waddell v. Roberts,* 139 Wash. 273, 246 Pac. 755, we stated:

> 'An attaching creditor, or an execution creditor, levying upon and selling property as the property of his debtor, is not an innocent purchaser, or a *bona fide* purchaser for value. He takes in the property only such interest as his debtor has. (Citing cases.)' "

Also see *R. F. C. v. Hambright*, 16 Wn. 2d 81, 133 P. 2d 278

For that reason the Trustee is not in a position to complain, nor to apply this section, 70(e), to his situation.

The bankruptcy courts will leave to state courts any determination of a dispute involving property set aside as exempt, and any rights which the Appellant may claim in the exempt property. *In Re Nixon*, 34 F. 2d 667. Appellant submits that for these various reasons this section, 70(e) (2), does not apply to the situation involving exempt personal property.

3. The bankrupt's exemptions are not affected by any interest Sears may have in the exempt property.

Once the exempt property has been claimed by the bankrupt, has been valued by the Trustee, and set aside to the bankrupt by the court, the fact that a conditional sales vendor exists, who, as between the bankrupt and the vendor, may have certain rights, does not affect the bankrupt's estate nor the bankrupt's creditors in any way. *In Re Durham*, 104 Fed. 231 (supra).

A bankrupt may waive an exemption as against one creditor without making the exempt property subject to other bankruptcy creditors. *Lockwood v. Exchange Bank*, 190 U.S. 294; 23 Sp. Ct. 751; 47 L. Ed. 1061, (supra); *In*

Re Lippow, 92 F. 2d 619, (supra). This waiver may be by contract and the bankrupt may keep control of the property, and as such it is no concern of the Trustee and does not detract from the bankrupt's estate in any way, nor change the property available for distribution to creditors just because a vendor may still be in existence.

> 3 *Remington on Bankruptcy,* Sections 1313-1314, at page 239:
>
> ". . . Mere transfer of some interest in the property to another does not affect the bankrupt's right to claim it as exempt, particularly where he retains control."
>
> At page 240:
>
> ". . . Even if a discharge is granted, it cannot in any way impair a lien arising out of contract on exempt property or liens acquired thereon by legal proceedings more than 4 months before bankruptcy."

The fact that there may be a lien for the purchase price, which is ineffective except as between the parties, will not affect the bankrupt's exemption rights, nor does such constitute a transfer that may be voided in the bankruptcy by the Trustee.

3 Remington on Bankruptcy, (supra)

Baumbaugh v. Los Angeles Morris Plan Co., 30 F. 2d 816 (supra)

In re Nixon, 34 F. 2d 667 (supra)

In re Consorto Const. Co., 212 F. 2d 676 (supra)

4. The Trustee cannot require the bankrupt to pay funds into the estate which are not subject to inclusion in the estate.

It seems obvious again to appellant that the bankrupt's estate consists of that property existing at the time of the bankruptcy. Whatever property he has, whatever interests there are, are fixed as of that date, and there is no provision in the Act compelling the bankrupt to pay into the estate any after acquired funds.

11 U.S.C.A., Sec. 110, Notes 781-820

Hudson v. Wylie, 242 F. 2d 435 at 444

> ". . . It is said by the court that it is one of the salutary policies of the Bankruptcy Act that one's wages earned after adjudication belong to him and not to his trustee. To hold otherwise, said the court, would be to put the bankrupt into a type of involuntary bondage."

To do so would defeat the purpose of the bankruptcy law. The position taken by the Trustee in this case can only be sustained by requiring the bankrupt to pay such after acquired funds into the estate.

The order entered from which this appeal is taken, places a condition on the bankrupt's retaining the exempt property, and that is that the bankrupt pay into the estate the balance of the purchase price. (Tr. 48, 67). The Trustee states that he is merely "preserving a lien of the appellant for the benefit of the estate", but the only way that it can be preserved is to require the bankrupt to pay in money which he must acquire subsequent to bankruptcy. The only alter-

native to the condition imposed by the order is to forfeit the exemptions. The only way the bankrupt can keep his exemptions under this order, the only way he can keep the sewing machine and the refrigerator, would be to pay into the estate $231.72 out of after-acquired funds. There is no other way the lien can be "preserved for the benefit of the estate". This should point out the error of the Trustee's position. Without a claim of exemption the property is in the bankrupt's estate. If the bankrupt claims this exemption the same result is achieved under the Trustee's theory, unless the bankrupt can be compelled to pay into the estate after acquired funds. This is nothing more than requiring the bankrupt to buy his exemptions. There is nothing in the spirit or wording of the Bankruptcy Act that requires such action.

This error is also apparent from the illogical basis on which the Trustee arrives at the "equity" he attempts to set aside to the bankrupt.

He has arbitrarily arrived at a so-called "equity" which is valued at $85.00. (Tr. 41). This figure was obviously arrived at by deducting the balance of the purchase price of $231.72 from the market valuation of the two items, found to be the sum of $316.72. Appellant submits that there is no accepted definition of "equity" and the Trustee's manner of arriving at such a figure is not logical. Suffice it to point out that property, rapidly depreciable, may reach a market value at a given date, equal to or even below the balance then due on the purchase price. If the purchaser at that time has paid in, as an example, one-half of the purchase price, he should have some "equity" in the property. But under

the Trustee's formula it would appear that the purchaser had no "equity" at all in the property. Subtracting the balance due from the then market value, leaves zero. It seems more logical to assume that if a purchaser had paid in one-half the purchase price, his equity should be one-half the value, disregarding the balance of the purchase price. An "equity" in property should be the pro-rate portion of the purchase price paid to the then market value. If an "equity" is to be set aside as exempt, this would result in setting aside an "equity" of one-half the market value with the Trustee then attempting, under his interpretation of the Act, to enforce the full balance of the purchase price which would include a portion of an exempt "equity" already set aside. This, the Trustee obviously cannot do. He cannot enforce a lien against exempt property, and this points out again, the fallacy of the Trustee's position and the error in arbitrarily arriving at an "equity" figure, which is not covered in the Bankruptcy Act and is not a logical basis for such assumption.

Appellant submits that as the order appealed from requires the bankrupt to pay into his estate after-acquired funds, as a condition to keeping his exemptions, it is obviously in error. As it is also apparent that the only way this so-called "lien" of Sears can be "preserved for the benefit of the estate" is to require the bankrupt to pay in such funds, that the error of the Trustee's position should be obvious.

CONCLUSION

Appellant, Sears, respectfully submits that as the Baldwins claimed their household goods as exempt, and as these items were within the allowable valuations under state law, that title did not ever vest in the Trustee, and these items should be set aside as exempt to the Baldwins free and clear of any lien in the Trustee. Appellant submits that the interest of Sears in such property in no way affects such exemptions, and that it does not give the Trustee power under 70 (e) (2) to preserve such "lien" for the benefit of the estate, for the double reason that 70 (e) (2) does not apply to exempt property, and the Trustee cannot require the bankrupt to pay after-acquired funds into the estate as a condition to keeping his exempt property. Any other conclusion is contrary to the purpose of the Bankruptcy Act. Appellant submits that the order appealed from is in error and that the order should be reversed and the Referee should be ordered to set apart to the Baldwins the refrigerator and the sewing machine as exempt, free and clear of any claim by the Trustee.

Respectfully submitted,

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RCW 6.16.020 — Exempt property specified. The following property shall be exempt from execution and attachment, except as hereinafter specially provided:

(1) All wearing apparel of every person and family.

(2) All private libraries not to exceed five hundred dollars in value, and all family pictures and keepsakes.

(3) To each householder one bed and bedding and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars coin in value. The other household goods and utensils and furniture specified above, shall, on the demand of the officer having the execution or attachment in hand, be selected by the husband, if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils and furniture equal in value to said five hundred dollars and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be prima facie evidence: (a) That such household goods, utensils and furniture are exempt from execution and attachment, (b) that the value of the property so selected is not over five hundred dollars.

(4) To each householder two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, That in case such householder shall not possess or shall not desire to retain the animals named above, *he may select from his*

property and retain other property not to exceed two hundred and fifty dollars coin in value. (emphasis supplied) The selection in the proviso mentioned, shall be made in the manner, and by the person and at the time mentioned in subdivision (3), and said selection shall have the same effect as selections made under subdivision (3), of this section.

(5) through (13) (not applicable.)

(14) A sufficient quantity of hay, grain or feed to keep the animals mentioned in the several subdivisions of this chapter, for six weeks. *But no property shall be exempt from an execution issued upon a judgment for the price thereof, or any part of the price thereof,* (emphasis supplied) or for any tax levied thereon.